Supreme Court, U.S.
FILED
OCT 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-274

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

GREENLEAF MOTOR EXPRESS, INC., AND
ASHTABULA CHEMICAL CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney

National Labor Relations Board
Washington, D.C. 20570

17pp

QUESTION PRESENTED

Whether the record contains substantial evidence supporting the National Labor Relations Board's conclusion that an unfair labor practice charge was filed within the six-month limitations period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is unpublished, but the judgment is noted at 872 F.2d 1027 (Table). The decision and order of the National Labor Relations Board (Pet. App. A16-A22), and the decision (Pet. App. A34-A58) and supplemental decision (Pet. App. A25-A30) of the administrative law judge are reported at 285 N.L.R.B. No. 116.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1989. A petition for rehearing and a suggestion for rehearing en banc were denied on May 18, 1989 (Pet.

App. Al-A2). The petition for a writ of certiorari was filed on August 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are two Ohio corporations, Greenleaf Motor Express, Inc. (Greenleaf) and Ashtabula Chemical Corp. (Ashtabula), that have engaged in the transportation of bulk chemicals. During the period relevant to this case, Greenleaf and the Union[1] were parties to a collective bargaining agreement that defined the bargaining unit to include all "drivers" or "driver-helpers" operating vehicles for transportation purposes and required each employee within the unit to join the Union within 31 days of initial employment. Pet. App. A4.

In 1979, Greenleaf's officers formed Ashtabula to buy and sell chemicals. In 1982, Ashtabula began to haul loads from Moundsville, Tennessee, using owner-operators or "brokers." These owner-operators leased their trucks by the trip and received separate payments for equipment rental and driving services. Late in October 1983, the brokerage arrangement ended. The Ashtabula drivers were placed on Ashtabula's payroll, but were assigned to Greenleaf to drive Greenleaf trucks. Greenleaf's and Ashtabula's drivers served the same customers, worked under the same supervisors, attended the same safety meetings, observed the same work rules, and sometimes were paired in a single truck. Greenleaf and Ashtabula drivers also received the same compensation, except that amounts deducted from the Greenleaf drivers' wages for health, welfare, and pension benefits were not

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[1] International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

deducted from the Ashtabula drivers' wages. None of the Ashtabula drivers joined the Union, and petitioners did not enforce the contractual union membership provision as to them. Pet. App. A5, A18-A19, A36-A37, A40.

In May 1984, Union Business Agent Frank Licate accompanied Greenleaf driver Jerry Ashley to Columbus, Ohio, to attend a hearing on a grievance filed by Ashley. From Ashley's remarks during the trip, Licate learned for the first time that the nonunion Ashtabula drivers were performing bargaining unit work. Pet. App. A5, A19. On June 5, at the outset of negotiations for a contract to replace the agreement due to expire in July, Licate submitted the Union's proposal, which included a provision requiring Greenleaf and Ashtabula to honor the recognition clause in the Master Freight Agreement by informing drivers of their obligation to join the Union.[2] Throughout the subsequent contract negotiations, the Union persisted in its demand that the Ashtabula drivers be recognized as part of the bargaining unit, and petitioners refused to do so. On August 18, the Union drivers voted to reject petitioners' contract proposal because it limited the bargaining unit to drivers receiving all their wages from Greenleaf. Petitioners then refused Licate's request for further bargaining. Pet. App. A5-A6, A42-A44, A52.

On September 12, 1984, the Union filed a charge with the Board; the charge alleged that, on or about May 1, the Union had learned that Greenleaf and Ashtabula were a single employer for purposes of the National Labor Relations Act and had nevertheless refused to apply the collective bargaining agreement to all of the employees within the bargaining unit. Pet. App. A7; C.A. App. 225. A complaint issued alleging that Greenleaf and Ashtabula constituted a

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[2] On the following day, Licate filed a formal grievance alleging that Greenleaf and Ashtabula were violating the recognition provisions of the agreement by refusing to enforce the union membership provisions with respect to Ashtabula drivers. Pet. App. A42-A43.

single employer within the meaning of the NLRA and, since on or about June 6, had refused to recognize and bargain with the Union concerning the wages, hours, and terms and conditions of employment of the drivers employed by Ashtabula, in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. A7; C.A. App. 227, 229.

2. Affirming the findings and conclusions of the ALJ with certain modifications, the Board found that Greenleaf and Ashtabula were a single employer for the purposes of the Act, and that all drivers employed by either company were members of a single bargaining unit. The Board affirmed the ALJ's findings that petitioners had violated Section 8(a)(5) of the Act by refusing to bargain with the Union with respect to the Ashtabula drivers and to apply the terms of the collective bargaining agreement to those drivers. See Pet. App. A17-A18 & n.3, A47, A54-A56. The adjudicated violations were limited to the six-month period preceding the filing of the Union's charge (March 12, 1984, to September 12, 1984). The Board did not affirm the ALJ's finding (Pet. App. A39) that petitioner had violated Section 8(a)(5) since 1982, observing that "[s]uch a finding reaches beyond the 10(b) period, is not alleged in the complaint, and is unnecessary to the resolution of the issues in the case" (Pet. App. A17 n.2). Finally, the Board concluded that petitioners had violated Section 8(a)(1) of the Act by dealing with their employees directly, rather than through their exclusive bargaining representative, and by coercively interrogating them concerning their union activities and sympathies. Pet. App. A17, A47-A52.

The Board rejected petitioners' contention that the refusal to bargain charge was time-barred under Section 10(b) of the Act, 29 U.S.C. 160(b).[3] The Board noted that

[3] Section 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

although Greenleaf employees, including the union steward, were aware of Ashtabula's existence during the period that it used owner-operators under brokerage arrangements, a number of factors tended to keep the Union unaware of any failure by petitioners to comply with their statutory obligations (Pet. App. A18):

> [T]he two groups of drivers initially worked in entirely different geographic areas, approximately 150 miles apart, had no regular contact with each other, and were unlikely to have any knowledge or concern about the others' terms and conditions of employment or union status. Moreover, the Ashtabula drivers worked in a different State, outside the jurisdiction of Local Union 377. Further, during 1982 and 1983 Ashtabula functioned as a brokerage operation whereby owner-operators leased their trucks to the company and received separate payments for equipment rental and their driving services.[4]

Even after petitioners modified their operations in late 1983 and began to make "intermittent assignments" of Greenleaf and Ashtabula drivers to the same runs, the Board continued, it was reasonable that none of the unionized Greenleaf employees would have known immediately that petitioners were circumventing their bargaining obligation and creating a parallel nonunion work force to perform bargaining unit work. Pet. App. A18-A19; see *id.* at

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[4] Owner-operators may be "independent contractors," rather than employees covered by the Act. See Section 2(3) of the NLRA, 29 U.S.C. 152(3); *Building Material & Dump Truck Drivers* v. *NLRB*, 669 F.2d 759, 764-765 (D.C. Cir. 1981), aff'd, 459 U.S. 344 (1983).

Since the Board's complaint did not allege a violation of the Act during the period that Ashtabula operated with owner-operators, it was not necessary for the Board to determine whether petitioners had violated the statute during that period or whether the owner-operators would be deemed employees.

A39-A47. The Board credited Union Business Agent Licate's testimony that, while he knew about the brokerage system in 1982 and 1983, he was not then aware that it had any impact on the Greenleaf operation or infringed on bargaining unit work, and it noted that the record was "clear that Licate first learned about [petitioners'] using nonunion drivers alongside unit employees in May 1984." The Board found "no basis for concluding that the Union condoned [petitioners'] activities or in any way waived its representational rights over the Ashtabula drivers." *Id.* at A19.

The Board ordered petitioners to bargain with the Union as the representative of all Greenleaf and Ashtabula drivers. The order also required petitioners to make the drivers on the Ashtabula payroll whole for any loss of monetary benefits they had sustained from petitioners' failure to apply the agreement to them for the period from March 12, 1984 (six months before the filing of the charge), to the time when good faith bargaining relieved them of their statutory obligation to continue the terms of the expired agreement in effect. Finally, the Board directed petitioners to cease and desist from interfering with their employees' Section 7 rights by bypassing the Union, polling and interrogating employees about their union sentiments, promising to establish an employer-employee committee to replace the Union, or engaging in other similar violations of the employees' rights. Pet. App. A20-A21.

3. In the court of appeals, petitioners conceded that their refusal to bargain with the Union as the representative of the Ashtabula drivers was unlawful under Section 8(a)(5) of the Act, but asserted that the Union's charge was untimely under Section 10(b). Pet. App. A8. In an unpublished opinion, the court of appeals rejected that contention and enforced the Board's order. Pet. App. A3-A15.

The court found substantial evidence in the record to support the Board's finding that the Union did not know until

May 1984 that the Ashtabula operation was being conducted in a manner that infringed on bargaining unit work. Pet. App. A12.[5] For several reasons, the court found "unpersuasive" petitioners' argument that they had openly and notoriously violated the collective bargaining agreement in 1982 and thus that the period of limitations had begun to run at that time. First, the court noted that because Ashtabula had used owner-operators prior to late 1983, it was reasonable to assume that the Union did not immediately know that petitioners were circumventing the collective bargaining agreement through the creation of a nonunion employee workforce. *Id.* at A10. Second, the court stated, the Union could reasonably have assumed, even in 1983, that the Ashtabula employee-drivers were owner-operators "without a sufficient shared 'community of interests' to comprise a single appropriate bargaining unit with the Greenleaf drivers." *Id.* at A10-A11. Third, the court noted that when petitioners opposed the Ashley grievance in 1984, they argued that the Ashtabula drivers were not working in violation of the agreement. Thus, the court observed, petitioners did not "openly engage in unlawful conduct, but effectively concealed [their] violations" *Id.* at A11.[6] Finally, the court noted that the Board's determination rested on its decision to credit the testimony of Union officials over testimony of petitioners' officers. The panel concluded that those credibility determinations were reasonable, and that there was "substantial evidence * * * to support the Board's

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[5] The court found reasonable both the Board's credibility determinations and its inferences from the record evidence (Pet. App. A9-A12).

[6] During contract negotiations with the Union in 1984, petitioners asserted that Greenleaf and Ashtabula were separate entities. Though petitioners later abandoned that contention, they continued to argue in proceedings before the ALJ that the Ashtabula and Greenleaf drivers were not members of a single bargaining unit. See Pet. App. A38; C.A. App. 87, 235-236.

finding that the Union did not know of the Company's unfair labor practices until May, 1984." *Id.* at A12.[7]

ARGUMENT

Petitioners seek further review only of the court of appeals' application of Section 10(b) to the facts of this case. However, the court of appeals correctly rejected petitioners' reliance on that statute of limitations, and its unpublished decision does not establish any new legal standard at variance with the decisions of this Court or of other courts of appeals. In any event, since the violations adjudicated by the Board and the relief it awarded were limited to the six-month period prior to the filing of the Union's charge, petitioners would not be entitled to relief from the court of appeals' judgment even if their view of the facts of this case were adopted. Further review is not warranted.

1. As petitioners note (Pet. 14), the courts of appeals have uniformly adopted the view that the six-month period of limitations begins to run when an injured party knows or should know that its statutory rights have been violated. Petitioners contend, however, that the Sixth Circuit has announced a new standard in this case – under which the period of limitations commences only when an employee receives "unequivocal notice" of a violation. Under their view, the court's decision "eliminates any reference to when the charging party should have known of the wrongful acts or any reference to a charging party's obligation to exercise due diligence to determine if its rights have been violated." Pet. 14. That is an unreasonable interpretation of the court of appeals' opinion, for several reasons:

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[7] The court also affirmed the Board's determination that petitioner had violated the Act by bypassing the Union and interrogating employees as to their union sympathies. Pet. App. A12-A15. Petitioner does not seek further review of that holding. Pet. 9.

First, in connection with the court of appeals' reference to "unequivocal notice"—a reference appearing only in a parenthetical in a "see also" citation—we note that the standard definition of "notice" includes both knowledge and "reason to know." See, *e.g.*, Restatement (Second) of Agency § 9 (1958).

Second, there is no indication that the panel intended to depart from the Sixth Circuit's decision in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 650 (1977), which, as petitioners concede (Pet. 14-15), is consistent with the decisions on which they rely from other courts of appeals.[8] To the contrary, the panel cited *Allied Products* with approval, and the full court denied a suggestion for rehearing en banc in which petitioners urged that the panel's decision had given rise to an intra-circuit conflict. Moreover, the court of appeals' decision in this case is unpublished—an action reflecting the panel's conclusion that the opinion does not "establish[ ] a new rule of law, or alter[ ] or modif[y] an existing rule of law"—and has limited precedential value. 6th Cir. R. 24(a)(i) and (c). Absent some clear indication that the Sixth Circuit has placed itself in conflict with decisions from other circuits, this Court's review is unwarranted.[9]

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[8] In *Allied Products*, the court said (548 F.2d at 650):

> The Board has consistently held, with the endorsement of at least two circuits, that the six month limitation period does not begin to run until the employer's unlawful activity, which is the basis for the unfair labor practice charge, has become known to the charging party. * * * This is only a specific application of the general rule that a limitation period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]."

The fact that the Sixth Circuit chose not to quote the second of these sentences in its opinion in the instant case does not signal any change in its interpretation of Section 10(b).

[9] The Sixth Circuit's "see also" reference to its decision in *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 362 (1987), cert. denied, 108 S. Ct.

Finally, the court of appeals' holding was not limited to a determination that the Union had no actual knowledge of any statutory violations that may have occurred prior to May 1984. In its analysis of the facts of the case, the court upheld the Board's determination that a variety of circumstances tended to keep the Union unaware of any violation that may have occurred during the period that Ashtabula was using owner-operators. Moreover, the court stated that even after those owner-operator arrangements had been terminated, the Union "could reasonably have assumed" that Ashtabula drivers were not members of the bargaining unit that the Union represented. Pet. App. A10-A11. In a footnote rejecting petitioners' laches and estoppel defenses, the court made the same point. It concluded that "[n]o proof has been offered to show that the Union knew *or had reason to know*, prior to May, 1984, that the Company had changed the status of the non-union Ashtabula drivers and had failed to require them to join the Union, thus violating the collective bargaining agree-

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2034 (1988), is not such an indication. *Armco*, which approved the rule established by the Board in *United Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397, 400 (1984), deals with a different situation. *United Postal Service* held that the limitation period begins to run when a charging party is unequivocally informed that an adverse action will be taken, and not at the later date when the action becomes effective. In effect, it prescribes when a violation is deemed to have occurred for purposes of the statute. That case does not deal with the question raised by petitioners here—whether a charging party should reasonably have been aware of a violation that has already occurred. Thus, the Sixth Circuit's qualified citation to that principle was entirely appropriate.

NLRB v. *IBEW, Local 112*, 827 F.2d 530, 533 (9th Cir. 1987), like *United Postal Service*, was a case in which the issue was whether the employer had actually committed itself to actions constituting an unfair labor practice. There is no conflict between that decision and decisions of other courts of appeals. See Pet. 15.

ment." *Id.* at A12 n.1 (emphasis added). Petitioners were not deprived of a determination on the question whether the Union should have known of their statutory violations; the Board and the court of appeals determined that it was reasonable for the Union not to have acquired that knowledge earlier than it did.[10]

In short, petitioners' assertion that the court of appeals' opinion announces a new standard at variance with decisions applying Section 10(b) and other statutes of limitations—the essential predicate for their contention that this case warrants this Court's review—is unfounded.

2. Petitioners also urge the Court to consider which party bears the burden of proof with respect to certain issues arising under the statute of limitations. Pet. 21-27. They argue that the court of appeals erred by failing to require the Board's General Counsel to bear the burden of proving "those facts or elements necessary to justify equitable tolling." See Pet. 22-23. Here again, petitioners' request for further review rests on a misinterpretation of the court of appeals' opinion.

The court's only reference to the placement of the burden of proof was its general observation that "because Section 10(b) is an ordinary statute of limitations, it is an affirmative defense that must be proved by the party alleging it." Pet. App. A9. There can be no dispute as to the accuracy of that principle, and petitioners do not suggest otherwise. The court did not address at all the narrower proposition on which petitioners rely—the contention that when a defendant makes out a prima facie case that a claim has

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[10] To be sure, petitioners argue that the Board's findings, which were affirmed by the court of appeals, were not supported by substantial evidence. Pet. 12. That factbound claim, however, is plainly undeserving of this Court's attention. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

accrued for purposes of a statute of limitations, the plaintiff should bear the burden of proving facts necessary to toll the statute.

That issue was not before the court of appeals on the facts of this case. Neither the ALJ nor the Board relied upon the burden of proof in deciding the case. Rather, they based their decisions upon testimony as to the manner in which the Union learned of petitioners' violations of the statute and evidence that bore on the reasonableness of its not having acquired that knowledge at an earlier point. Since there was ample evidence bearing on the statute of limitations issue, and since the Board found that the evidence supported the Union's position, it was immaterial which party bore the burden of proof. In reviewing the Board's decision, therefore, the court of appeals had no occasion to consider which party might have the burden of going forward, or the burden of persuasion, with respect to equitable tolling, fraudulent concealment, or the other doctrines referred to in the petition.

Indeed, the Board's complaint sought only an adjudication that petitioners had violated Section 8(a)(5) of the Act during the six-month period preceding the Union's unfair labor practice charge (see Pet. App. A17 n.2), and the Board's relief was limited to that period. The Board's claim thus entailed no "tolling" of the statute of limitations as such—*i.e.*, no determination whether fraudulent concealment or other circumstances made it appropriate to consider violations that would otherwise fall outside of the period of limitations.

3. Even if it could be shown that the court of appeals misapplied the statute of limitations, there would remain an alternative basis for affirming its judgment. As noted above, the General Counsel's complaint sought only an adjudication that petitioners violated the Act by failing to bargain with the Union as the representative of the Ashtabula drivers during the six months preceding the

Union's charge. The ALJ stated that even if a union is aware of violations by an employer that have taken place outside the limitations period, that "does not mean that that employer becomes licensed to continue its illegal conduct." Pet. App. A39. At least two members of the Board panel affirmed that alternative basis for finding petitioners' violations actionable,[11] and the Board expressly noted that its adjudication of petitioners' violations of Section 8(a)(5), like the relief awarded for those violations, was limited to the six-month period preceding the Union's charge (Pet. App. A17 n.2). Although the court of appeals did not rely on these limitations in the Board's decision, they provide an adequate alternative basis for affirming its order.

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[11] With respect to the third member of the Board panel, the Board's opinion noted (Pet. App. A19 n.5):

> Because the Union's knowledge of this practice and [petitioners'] refusal to bargain on demand occurred within the 10(b) period, Chairman Dotson finds it unnecessary to pass on the judge's alternative analysis concerning continuing violations of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney

National Labor Relations Board

OCTOBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00558